IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: YONAS ZEGEYE HIRUT SELESHI	:	
YONAS ZEGEYE and HIRUT SELESHI	:	
Appellants	:	
v.	:	Civil Action No. DKC 2004-1387
KEVORK KESHISHIAN	:	
Appellee	:	

MEMORANDUM OPINION

Appellee Kevork Keshishian moves for rehearing, pursuant to Fed.R.Bankr.P. 8015, requesting that this court reconsider its ruling of January 21, 2005. Paper nos. 9, 10. Oral argument is deemed unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. *See* Fed.R.Bankr.P. 8012. For the reasons that follow, the court will deny the motion.

I. Background[1]

On March 14, 1996, Keshishian and debtor/appellant Yonas Zegeye entered into an employment agreement whereby Keshishian would work as a radiologist medical services business to be

[1] For a fuller exposition of this case, *see* paper no. 9, this court's Memorandum Opinion of January 21, 2005.

established by Zegeye. The business, however, never got off the ground, and Zegeye subsequently filed for Chapter 11 bankruptcy. Keshishian then filed a claim for money owed pursuant to the employment agreement. Zegeye objected to the claim, contending that he owed nothing to Keshishian. On that claim, Bankruptcy Judge Duncan W. Keir granted in part and denied in part the objection, and ordered that the claim in the amount of $307,500 plus interest be paid. *See* case no. 97-22971-DK (hereinafter "Bankr. Proceeding"), paper no. 1369. That court found that Keshishian terminated the agreement, but that Zegeye nonetheless owed him the full value of his five-year contract, except in that (1) Zegeye had already paid him $17,500 and (2) his damage award was capped by Section 502(b)(7) of the Bankruptcy Code, 11 U.S.C. § 502(b)(7), which limited his claim to "one year following . . . the date on which the . . . employee terminated performance." The court therefore awarded damages equal to the value of the employment agreement from its inception until one year after its date of termination, less the amount Zegeye had already paid Keshishian.

Zegeye appealed, and this court reversed in part, finding that because, as the bankruptcy court had found and this court and all parties agreed, the agreement was effectively terminated by Keshishian's actions, Keshishian was entitled to the full

value of the employment agreement only through October 28, 1997, the date on which he terminated the agreement. *See* paper nos. 9 (Memorandum Opinion) and 10 (Order).

Keshishian now moves for rehearing pursuant to Bankruptcy Rule 8015. Keshishian contends that his termination was the result of constructive discharge, and that he is therefore entitled to the full $307,500 as found by the bankruptcy court prior to appeal.

II. Standard of Review

Rule 8015 states that "a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel." The purpose of Rule 8015 is to provide recourse to a party who, after a district court or bankruptcy appellate panel has decided an appeal, "believes that the appellate tribunal has overlooked or misapprehended some point of law or fact." 10 Collier on Bankr. P 8015.01 (15th ed. rev. 2004). When the district court is acting as an appellate court in a bankruptcy case, Rule 8015 provides the sole mechanism for filing a motion for rehearing. *English-Speaking Union v. Johnson,* 353 F.3d 1013, 1019 (D.C.Cir. 2004) (quoting *Butler v. Merchants Bank & Trust Co. (In re Butler, Inc.),* 2 F.3d 154, 155 (5th Cir. 1993)).

Rule 8015 is silent as to the appropriate standards for granting a rehearing, and the Fourth Circuit has not designated a standard. At least two courts have applied the test traditionally used to evaluate motions for reconsideration. *See In re Envirocon Int'l Corp.*, 218 B.R. 978, 979 (M.D.Fla. 1998) (Rule 8015 motion is "reviewed in the same manner as a motion for reconsideration," and thus granted only if there is "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear and manifest injustice"); *Shawnee State Bank v. First Nat'l Bank (In re Winders),* 202 B.R. 512, 517 (D.Kan. 1996) (because "Rule 8015 is silent as to the standard for granting a rehearing, but granting a motion for reconsideration is within the discretion of the court whose order is subject to the motion," court would rehear only if "there is an intervening change in the controlling law or it becomes necessary to remedy a clear error of law or to prevent obvious injustice") (citations omitted). More courts, however, have found that "because Rule 8015 was derived from Fed.R.App.P. 40, it is appropriate to look to the appellate rule for guidance." *Olson v. United States,* 162 B.R. 831, 834 (D.Neb. 1993) (citing 9 Collier on Bankr. P 8015.04 at 8015-4 (15th ed. rev. 1993)); *see Kosmala v. Imhof (In re Hessco Indus., Inc.),* 295 B.R. 372, 375 (B.A.P. 9th Cir. 2003) (citing *Olson*);

Illinois Dep't of Revenue v. Raleigh (In re Stoecker), 179 B.R. 532, 539 (N.D.Ill. 1995) (citing Collier on Bankr.); *Young v. Paramount Communications (In re Wingspread Corp.),* 186 B.R. 803, 807 (S.D.N.Y. 1995) (citing *Olson*); *see also United States v. Fowler (In re Fowler),* 394 F.3d 1208, 1215 (9th Cir. 2005) (noting conflicting authorities and finding no abuse of discretion where trial court relied upon Fed.R.App.P. 40).

Appellate Rule 40 provides in part: "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ." Fed.R.App.P. 40(a)(2). Petitions for rehearing are designed to ensure that the appellate court properly considered all relevant information in rendering its decision. *In re Hessco Indus., Inc.,* 295 B.R. at 375 (citing *Armster v. U.S. Dist. Court,* 806 F.2d 1347, 1356 (9th Cir. 1986)). A petition for rehearing is not a means by which to reargue a party's case, *In re Hessco Indus., Inc.,* 295 B.R. at 375 (citing *Anderson v. Knox,* 300 F.2d 296, 297 (9th Cir. 1962)), or to assert new grounds for relief, *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988)(per curiam).

III. Analysis

Appellee's argument is not properly before this court because it was not raised below before Judge Keir. "As an appellate court, this court 'applies the standard of review generally applied in [the] federal court [of] appeals' and will not generally consider issues not raised before the bankruptcy court." *Snow v. Countrywide Home Loans, Inc. (In re Snow),* 270 B.R. 38, 41 (D.Md. 2001) (quoting *Webb v. Reserve Life Ins. Co.,* 954 F.2d 1102, 1103-04 (5th Cir. 1992)). *See Muth v. United States,* 1 F.3d 246, 250 (4th Cir.1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered.") (citing *Nat'l Wildlife Fed. v. Hanson,* 859 F.2d 313, 318 (4th Cir. 1988) and others). "Exceptions to this general rule are made only in very limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice." *Muth,* 1 F.3d at 250 (citing *Nat'l Wildlife Fed.,* 859 F.2d at 318).

Appellee nonetheless argues that the issue is properly presented here because, while the issue was never raised explicitly, the presence of the issue can be inferred from Judge Keir's ruling, which (1) referred to the facts that Zegeye had breached the employment agreement, entitling Keshishian to

damages, and that Keshishian was found to have terminated the agreement "in an effort to reasonably mitigate the damages which Dr. Keshishian was suffering from non-payment under the agreement;" and (2) relied upon two wrongful discharge cases, *Atholwood Dev. Co. v. Houston,* 19 A.2d 706 (Md. 1941) and *Lemlich v. Board of Trs,* 385 A.2d 1185 (Md. 1978), in determining damages.

Neither inference is persuasive. While the decisions of both the bankruptcy court and this court discussed when and by whom the agreement was terminated and whether and to what extent Appellee mitigated his damages, the argument that Appellee was constructively discharged was simply never raised in the bankruptcy court. Likewise, that the bankruptcy court relied (erroneously) upon two decisions involving wrongful discharge as its basis for determining damages does not mean that it presumed that, or even considered whether, Zegeye constructively discharged Keshishian. No other exceptional circumstance being asserted, the court finds that the issue of constructive discharge is not properly raised here.

The court notes additionally that even if it were to consider the constructive discharge issue, Appellee would not prevail. As Appellee himself recites, the standard for constructive discharge is whether the employer has *deliberately*

caused or allowed the employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign. *Muench v. Alliant Foodservice, Inc.,* 205 F.Supp.2d 498, 505 (D.Md. 2002) (citing *Williams v. Md. Dept. of Human Resources,* 764 A.2d 351, 364 (Md.Ct.Spec.App. 2000) (italics added). Appellee asserts that "the failure and/or refusal by Dr. Zegeye to pay a salary to Dr. Keshishian for over a year is a deliberate act by an employer to make an employer's working conditions intolerable." Paper no. 12, at 4. Neither the bankruptcy court nor this court found any such deliberateness in Zegeye's failure to pay the salary; on the contrary, the bankruptcy court found that Dr. Keshishian's mitigating activity prior to October 1997 was "by agreement of all parties," "awaiting the advent, if you will, of Dr. Zegeye's company being up and running." Bankr. Proceeding, paper no. 1368, at 8, 9. This indicates that the parties all wanted the same thing: namely, that the business get "up and running." There is no indication anywhere in the record that any of Zegeye's actions constituted a deliberate attempt to oust Keshishian from the employment agreement. The failure of his business would be insufficient, by itself, to establish the deliberation required in a constructive discharge claim.

Appellee's motion is denied. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

March 4, 2005